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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No.

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
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OCTOBER TERM, 1968

No.

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Continental Nut Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 22, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 395 F.2d 830 and appears herein as Ap-

pendix A, at p. i. The Decision and Order of the National Labor Relations Board in this case (which was enforced by the Court of Appeals) is officially reported at 164 NLRB No. 72 and appears herein as Appendix B, at p. ix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1968 (Appendix A, p. i). Rehearing was denied on July 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(e).

QUESTION PRESENTED

Whether the court below applied an erroneous standard of review which is inconsistent with the proper standard of reviewing in election determination cases under the National Labor Relations Act.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.), the Statements of Procedure of the National Labor Relations Board—Series 8, as amended (29 C.F.R. Section 101.1, et seq.), and the Rules and Regulations of the National Labor Relations Board—Series 8, as amended (29 C.F.R.

Section 102.1, et seq.) are set forth in Appendix C, at p. xxii.

STATEMENT

This case arises from a representation proceeding under the National Labor Relations Act.

On August 17, 1966, the Union[1] filed a petition with the Board seeking an election among Petitioner's employees. On September 6, 1966, Petitioner and the Union executed an Agreement for Consent Election. An election was held on September 12, 1966, which resulted in a majority vote for the Union. Thereafter, Petitioner filed timely objections to the election alleging that the Union had made certain promises of benefit to the employees. On December 1, 1966, the Regional Director issued a Report on Objections and Certification of Representative. The Regional Director found that the Union had in fact made promises of benefit to the employees to the effect that the initiation fee would probably be reduced if the Union won the election. The Regional Director overruled Petitioner's objections, however, citing the Board's *per se* rule that, as a matter of law, a promise by a Union to reduce or waive initiation fees if the election is won does not impair the employees' freedom of choice.[2]

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[1]Warehousemen's Union Local 17, International Longshormen and Warehousemen's Union.

[2]The Regional Director cited the Board's decision in *Weyerhaeuser Company*, 146 NLRB 1. In that decision the Board expressly relied on its earlier decision in *Gilmore Industries, Inc.*, 142 NLRB 781. The *Gilmore* case, however, has been overruled by the Sixth Circuit. *National Labor Relations Board v. Gilmore In-*

The Regional Director then certified the Union as the exclusive representative of the employees.

Petitioner refused to bargain with the Union in order to obtain judicial review of the Board's *per se* rule.[3] This resulted in the filing of the unfair labor practice charge which underlies this case. Upon the General Counsel's motion for summary judgment, the Board issued its decision and order on May 10, 1967, finding that Petitioner had unlawfully refused to bargain.

Thereafter, the Board petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its order.

Petitioner urged the court to overrule the Board's *per se* rule as the Sixth Circuit had done in the *Gilmore* case.[4]

The court below, however, upheld the Board's order without reaching the merits of Petitioner's objections on the ground that under the Agreement for Consent Election the determinations of the Regional Director are binding upon the Courts of Appeals unless they are arbitrary and capricious. The specific language relied on by the court below is contained in paragraphs

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dustries, Inc., 341 F. 2d 240 (C.A. 6); c.f. *Truck Drivers and Helpers Local Union 568 v. National Labor Relations Board*, 379 F. 2d 137, 145 (C.A.D.C.).

[3]Representation cases are not directly reviewable under the National Labor Relations Act. However, they are subject to judicial review when a related unfair labor practice proceeding is before the court. See Section 9(d) of the Act which specifically provides that the record in representation proceedings is to be included in the record filed with the Courts of Appeals under Sections 10(e) or 10(f).

[4]See *supra* n. 2

1 and 6 of the Agreement for Consent Election and is as follows:

> "1. Secret Ballot. . . . The determination of the Regional Director shall be *final and binding* upon any question including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election . . .
>
> "6. Objections, challenges, reports thereon. . . . The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be *final and binding.*" (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

The court below, in enforcing the Board's decision that Petitioner had unlawfully refused to bargain, applied an erroneous standard of review which has, in effect, deprived Petitioner of its statutory right to review as set out in Section 10(e) of the National Labor Relations Act. Because of the importance of this issue to the proper administration of the Act, we submit that Supreme Court review is warranted.[5]

1. Section 10(e) of the Act, which provides for judicial review of Board orders, specifically provides that the substantial evidence rule is the stand-

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[5]The Board conducted 8,324 representation elections during the past fiscal year, and objections to the elections were filed in 1,471 of these cases. Thirty-first Annual Report of the NLRB, p. 203 (G.P.O., 1967). Many of these election cases are reviewed in the Courts of Appeals each year.

ard of review to be applied by the Courts of Appeals. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474. The substantial evidence rule applies in all cases, including election determinations. *Celanese Corp. v. National Labor Relations Board,* 291 F.2d 224, 225 (C.A. 7), cert. denied 369 U.S. 925; *National Labor Relations Board v. Bata Shoe Co.,* 377 F.2d 821, 827 (C.A. 4), cert. denied 389 U.S. 917. The court in the instant case, however, failed to apply the substantial evidence rule. Instead, it refused even to consider the merits of the case, holding that the appropriate standard of review was whether the determination was "arbitrary and capricious".[6]

2. Contrary to the decision of the court below, there is no legitimate basis for limiting the scope of judicial review because the parties entered into a consent election agreement which made the determination of the Board's Regional Director "final and binding". This agreement limits review only within the administrative process and is not designed to limit judicial review.

The Board, by its Rules and Regulations and Statements of Procedure has provided for two methods of consent election.[7] Section 102.62(a) of the Rules and Regulations provides for a consent election agreement

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[6]The court below incorrectly stated that Petitioner did not assert that the Regional Director was arbitrary or capricious or that his determination was not in conformity with the Board policies or provisions of the Act. See Petitioner's Petition for Rehearing which is part of the record of this case.

[7]Although Section 9(c)(1) of the Act provides for a hearing before an election, a later subsection of Section 9(c), subsection (4), provides that such hearings may be waived by stipulation for the purpose of a consent election.

leading to a determination by the Regional Director of the facts ascertained after such consent election and Section 102.62(b) provides for a consent election agreement leading to a determination by the Board of the facts ascertained after such consent election. Pursuant to this regulation, the Board has adopted two standard forms which are reproduced in Appendix D. There is the Agreement for Consent Election, hereafter called "Agreement", with the final determination by the Regional Director, and, the Stipulation for Certification upon Consent Election, hereafter called "Stipulation", with the final determination being made by the Board.

It should be obvious that any interpretation of the language of either the Agreement form or the Stipulation form must be consistent with the Rules and Regulations and Statements of Procedure from which the forms are derived. Yet, as we now show, the interpretation of the Court below lacks such consistency.

In Section 101.19 of the Statements of Procedure, the Board, after describing the Agreement method in subsection (a), summarizes the difference between the Agreement and the Stipulation in subsection (b):

> "Thus, it is provided that the *Board, rather than the Regional Director, makes the final determination* of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election." (Emphasis supplied.)

In this context, we submit that the language "final and binding" in the Agreement form refers to the fact that there is no appeal to the Board with regard to the Regional Director's determinations and that they

are final in the same sense as the determinations of the Board under the Stipulation method are considered final.[8]

Under this interpretation it would follow that upon Court review, there would be no distinction between the "final" determination of the Regional Director under the Agreement method and the "final" determination of the Board under the Stipulation method. In this regard Section 102.62(a) of the Board's Rules and Regulations is clearly in point.

> ". . . The ruling and determinations by the Regional Director of the results shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, *with the same force and effect as if issued by the Board. . . .*" (Emphasis supplied.)

If the certification under the Agreement form is to have the "same force and effect" as a certification issued by the Board under the Stipulation form, then it is error to sharply restrict the scope of review of one of the certifications as the Court below did here.[9]

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[8]As mentioned *supra* n. 3, representation cases are not directly reviewable and it is in this sense that a certification is considered final whether issued by the Regional Director pursuant to the Agreement or by the Board pursuant to the Stipulation.

[9]This is not to say that parties to an election could not expressly waive their right to judicial review. The Board has not presented the parties with a true waiver, however. What the Board has done is to set up two different procedures for conducting consent elections and then conditioning the use of one of them on a severe restriction on the scope of judicial review. Petitioner signed the Agreement form in order to have the Regional Director, rather than the Board, make the final *administrative* determination and not to waive judicial review of that administrative determination. For the Board to say that you can't have the Regional Director

3. By refusing properly to review the merits of the instant case under the substantial evidence rule, the court below has prevented Petitioner from obtaining review of an important issue of labor law on which the Courts of Appeals have applied inconsistent approaches. Compare *National Labor Relations Board v. Gilmore Industries, Inc.*, 341 F.2d 240 (C.A. 6) with *National Labor Relations Board v. Gorbea, Perez & Morell*, 328 F.2d 679, 682 (C.A. 1). Moreover, the court has adhered to an erroneous review policy which could deny proper review in a substantial number of election cases under the administration of the National Labor Relations Act.

This court has quite properly placed great importance on the availability of judicial review of orders of administrative agencies. Thus, in *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140, the Court stated that:

> ". . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

The question of how the Agreement form should be interpreted has been placed before this Court on one occasion, but the Court specifically refused to decide the issue at that time and instead decided the case on the merits of the underlying issue. *National Labor Relations Board v. A. J. Tower Company*, 329

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make the final determination unless you also agree to give up your right to judicial review is to seriously undermine the statutory right to such review. Cf. *United States v. Jackson*, 20 L.Ed. 2d 138. This Court should not allow such an important right to be derogated in such a flagrant manner.

U.S. 324, 335 (1946). Since that time the Courts of Appeals have uniformly accepted the Board's interpretation of the Agreement form, an interpretation which is contrary to the Board's own Rules and Regulations and Statements of Procedure.[10]

Therefore, if this valuable and substantial statutory right is to be protected, it must be done by this Court. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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October, 1968

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[10] *Manning, Maxwell & Moore, Inc. v. National Labor Relations Board*, 324 F. 2d 857, 858 (CA 5); *National Labor Relations Board v. Parkhurst Manufacturing Co.*, 317 F. 2d 513, 516 (C.A. 8); *National Labor Relations Board v. J. W. Rex Co.*, 243 F. 2d 356, 358 (C.A. 3); *Elm City Broadcasting v. National Labor Relations Board*, 228 F. 2d 483, 485, 486 (C.A. 2); *National Labor Relations Board v. Voleny Felt Mills*, 210 F. 2d 559, 560 (C.A. 6); *National Labor Relations Board v. Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 240 (C.A. 1).

(Appendices Follow)

Appendix A

OPINION AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WHICH IS REPORTED AT 395 F.2d 830.

United States Court of Appeals
for the Ninth Circuit

No. 22,338

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CONTINENTAL NUT COMPANY,
Respondent.

[May 22, 1968]

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: MADDEN, Judge of the United States Court of Claims, and MERRILL and BROWNING, Circuit Judges.

MADDEN, Judge:

The National Labor Relations Board has petitioned this court, pursuant to § 10(e) of the National Labor Relations Act, 29 U.S. Code § 151, for enforcement by the court of the Board's order directing the respond-

ent, Continental Nut Company, to bargain collectively with Warehousemen's Union, Local 17, International Longshoremen's and Warehousemen's Union, a union of its employees, and to cease and desist from certian other unfair labor practices. The two entities will hereinafter be called the employer and the union.

We narrate the events which led up to the instant appeal to this court. The union filed a petition with the Board pursuant to § 159 of Title 29, United States Code, requesting the Board to certify the union as the sole collective bargaining agent for a certain unit of the company's employees. As not infrequently occurs, the parties entered into a written agreement for a "consent election," instead of going through what is sometimes a rather ponderous hearing at which evidence is taken concerning the jurisdiction of the Board, the appropriate unit of employees to be included in the election if an election is ordered by the Board, and perhaps other pertinent matters. In this case there were no such unresolved problems and the parties, as we have said, agreed that the sentiment of the employees as to whether or not they desired to be represented by the petitioning union might be determined in an election to be conducted by the Board's Regional Director, under the Board's rules applicable to consent elections.

The election agreement, signed by the employer and the union and approved by the Regional Director, was a stereotyped document, the language of which had frequently been used by the Board in

similar circumstances. We quote the pertinent parts of the agreement, italicizing some of its language:

> 1. SECRET BALLOT . . . Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, provided that the determinations of the Regional Director shall be final and binding *upon any question,* including questions as to the eligibility of voters, raised by any party hereto relating *in any manner to the election* . . .
>
> * * * * *
>
> 6. OBJECTIONS, CHALLENGES, REPORTS THEREON
>
> Objections to the conduct of the election or conduct affecting the results of the election, or to a determination based on the results thereof, may be filed with the Regional Director within 5 days after the issuance of the Tally of Ballots . . . The Regional Director shall investigate the matters contained in the objections and issue a report thereon. . . . The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

The election took place on October 28, 1966. The union and the employer, both of which had had observers present at the election, signed certificates that the election had been fairly conducted. The votes were counted and there were 90 votes for the union and 73 against it, and two challenged ballots. On Novem-

ber 4 the company filed an objection to the election, as the election agreement authorized it to do. The stated ground for the objection was that the union had promised numerous employees that initiation fees would be waived if the union won the election. The Regional Director made a full investigation and, on December 1, 1966, a report, as the election agreement required. He overruled the employer's objection and stated in his report that the union had told employees that initiation fees for all employees would be reduced if the union won the election, and had told them that the union, in the past, had reduced initiation fees when a large group of employees had joined the union at the same time. He stated in his report that the union's promises were not objectionable because the employees understood that any reduction in the initiation fee would apply to all employees who joined the union, regardless of how any individual employee voted in the election. Having overruled the company's objection, the Regional Director certified the union as the sole collective bargaining agent.

On December 19, 1966, the union requested the employer to meet with it for the purpose of negotiating a collective bargaining agreement. The employer by letter dated December 28, 1966, refused to enter into collective bargaining negotiations, for the stated reason that it did not believe that the election reflected the free choice of its employees and that the Regional Director's certification was therefore invalid.

The union thereupon filed a "charge" with the Board, which is the proper move on the part of a union which seeks to initiate an unfair labor practice proceeding. It charged that the employer had refused to bargain with it, although it was the certified collective bargaining agent of the employees, and had thereby violated § 8(a) (5) of the Labor Relations Act, 29 U.S. Code § 158(a) (5), which makes an unjustified refusal to bargain an unfair labor practice, and had also, by its refusal to bargain, violated §8(a) (1) of the Act, 29 U.S. Code § 158(a) (1), which makes interference, restraint or coercion of employees in the exercise of their rights under the Act an unfair labor practice.

The Regional Director issued a "complaint" upon the union's charge, which is the proper next step if the Regional Director regards the charge as well founded. The employer filed its answer to the complaint, denying that it had committed the alleged unfair labor practice, and giving the reason which we have stated hereinbefore for refusing to bargain with the union. The General Counsel made a motion requesting the Board to issue a summary judgment holding that the employer had violated its duty to bargain collectively with the union, and ordering it to bargain. The Board served a notice on the employer to show cause why a summary judgment should not be rendered. The employer responded to this notice, giving the same reason that it had given before for refusing to bargain with the union.

The Board refused to pass upon the merits of the Regional Director's decision, that decision, as we have seen, being that the union's pre-election statements to the employees about a reduction of initiation fees was not, in the circumstances, a valid basis for an objection by the employer to the election. The Board noted that the employer had agreed in the consent election agreement to be bound by the findings and conclusions of the Regional Director on objections to the election. We have quoted the text of the consent election agreement hereinbefore. The Board recognized that an implied exception to the finality provisions of the agreement would be applicable if the objector alleged and proved that the Regional Director's determinations were arbitrary or capricious. The employer in the instant case did not assert before the Board, nor does it assert here, that the Regional Director in making his determination was arbitrary or capricious or that his determination was not in conformity with the Board policies or the provisions of the Act. In N.L.R.B. v. Hood Corporation, 346 F.2d 1020, 1022-1023, this court held that in such circumstances the Regional Director's determination, made pursuant to a consent election agreement comparable to the one involved in the instant case, cannot be overturned by a court. See also N.L.R.B. v. Cadillac Steel Products Corp., 355 F.2d 191, 192 (CA 9); N.L.R.B. v. Sumner Sand and Gravel Co., 293 F.2d 754, 755 (CA 9); N.L.R.B. v. Carlton Wood Products Co., 201 F.2d 863, 867 (CA 9). The purpose of the courts in refraining from reviewing determinations made by Regional Directors on objections to

Labor Board elections is discussed in N.L.R.B. v. J. W. Rex Co., 243 F.2d 356, 358 (CA 3). That purpose is, of course, to provide for the final settlement without delay of disputes concerning objections to such elections. When the parties have, as in the instant case, entered into a consent election agreement, they have done so for the purpose expressed by the court in the Rex case.

The language of the consent election agreement, quoted supra herein, is comprehensive. It gives to the Regional Director the power to make a final and binding determination "upon any question . . . raised by any party hereto relating in any manner to the election." The employer, seeking to narrow the powers of the Regional Director, quotes language of this court in the case of N.L.R.B. v. Hood Corporation, 346, F.2d 1020, 1022, as follows:

> It is well settled that where a consent agreement is entered into providing that the determination of the Regional Director on any question shall be final and binding, the procedural and substantive determinations thereafter made by the Regional Director can be successfully challenged only by a showing that they are arbitrary or capricious or not in conformity with the National Labor Relations Board policies or the provisions of the Act.

The employer would read the words "procedural and substantive" as a commendable example of meticulous care by this court to refrain from saying more than it intended to say. It would read the words "procedural and substantive" as words of limitation,

rather than words of grant. Its theory is that its objection is based upon a question of fact decided erroneously by the Regional Director and that questions of fact are not included within this court's language, "procedural and substantive," used in the Hood case. This proposed reading is a notable example of looking at the bright side of the subject under scrutiny. But the words will not bear the suggested interpretation. When a tribunal has the power to finally decide the procedural and substantive questions involved in a case, it has the power to decide the case, or, as the consent election agreement said, "any question . . . relating in any manner" to the case.

That the employer had refused to bargain was undisputed. Its asserted justification for the refusal was without merit. Its refusal interfered with, restrained, and coerced the union in the exercise of its rights under the Act. The employer thus violated §§ 8(a)(5) and (1) of the Act. Full enforcement of the Board's orders granted.

Appendix B

DECISION OF THE NATIONAL LABOR RELATIONS BOARD, WHICH IS REPORTED AT 164 NLRB No. 72.

United States of America
Before the National Labor Labor Relations Board

Case No. 20-CA-4360

CONTINENTAL NUT COMPANY
and
WAREHOUSEMEN'S UNION LOCAL 17, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

DECISION AND ORDER

Upon a charged filed by Warehousemen's Union Local 17, International Longshoremen's and Warehousemen's Union, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint dated February 2, 1967, against Continental Nut Company, herein called Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hear-

ing before a Trial Examiner were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about December 1, 1966, the Regional Director for Region 20 duly certified the Union as the exclusive bargaining representative of Respondent's employees in the unit stipulated by the parties to be appropriate and that, since on or about December 28, 1966, and continuing to date, Respondent has refused and is refusing to recognize or bargain with the Union as such exclusive bargaining representative, although the Union has requested and is requesting it to do so. On or about February 13, 1967, the Respondent filed its answer denying the commission of the unfair labor practices alleged.

On March 2, 1967, the General Counsel filed with the Board a Motion for Summary Judgment, asserting, in view of admissions contained in the Respondent's answer and other relevant material annexed as appendices to the moving papers, that there are no issues of fact or law requiring a hearing and praying the issuance of a Decision and Order finding the violations as alleged in the complaint. Thereafter, on March 7, 1967, the Board issued an Order Transferring Proceeding to the Board, and, on the same date, a Notice to Show Cause on or before March 21, 1967, why the General Counsel's Motion for Summary Judgement should not be granted. On March 23, 1967, the Respondent filed an answer to the Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

Ruling on the Motion for Summary Judgment

The record establishes that on August 17, 1966, the Union filed a petition seeking to represent certain employees of Respondent (Case No. 20-RC-7136). On September 12, 1966, the Regional Director approved an Agreement for Consent Election executed by the parties which stated that the following employees of the Respondent constituted an appropriate unit:

> All production and maintenance employees of the Employer at its processing plant in Chico, California, including warehousemen, but excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act.

On October 28, 1966, an election was conducted among the employees in the above unit with the Union receiving a majority of the valid votes cast.[1] On or about November 4, 1966, Respondent filed Objections to Conduct Affecting Results of Election. On December 1, 1966, the Regional Director overruled the objections and certified the Union as bargaining representative of the employees in the appropriate unit. By letter dated December 19, 1966, the Union re-

[1]There were two challenged ballots which were not determinative of the election.

quested Respondent to meet with it for the purpose of negotiating a collective-bargaining agreement. By letter dated December 28, 1966, Respondent refused the request.

In its answer to the Notice to Show Cause, Respondent defends its refusal to bargain on the ground that the Regional Director erred in failing to sustain its objections to the election. We disagree.

Prior to the election the parties executed a Consent Election Agreement. Under the terms of that agreement the Regional Director's rulings on objections are to be "final and binding".[2]

Subsequent to the election Respondent filed objections which alleged that the Union had promised a number of employees that it would waive their initiation fees if it were selected as their bargaining representative. The Regional Director investigated the objections and found that the Union had told employees that the initiation fees for all employees would be reduced if the Union won the election. He further found that at two separate preelection meetings the Union, in response to inquiries, told employees that in the past the Union had reduced initiation fees when a large group of employees had joined the Union at the same time. The Regional Director concluded that the promises were not objectionable because the employees understood that any

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[2] *Jas. A Matthews Co.*, 145 NLRB 1680, 1683. See NLRB Rules and Regulations, Series 8, as amended, Section 102.62(a), at p. 24. Also, see Agreement for Consent Election, par. 6, attached to the formal papers as Appendix 2.

reduction in the initiation fee would apply to all employees as a group and would not be contingent on how individual employees voted. Accordingly, he overruled the objections.

Respondent contends that the Regional Director erred in his findings and conclusions. However, as noted, Respondent agreed to be bound by the Regional Director's findings and conclusions. Therefore, we do not pass upon the merits of his decision. In order for the Employer to prevail here, it must be alleged, and proved, that the Regional Director's determinations were arbitrary or capricious.[3] In this case, Respondent's allegations and evidence in support thereof fall far short of such proof. Accordingly, there are no issues of fact or law which require a hearing.

Thus, as all material issues have been decided by the Board in accordance with the allegations in the complaint, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

Finding of Fact

I. *The Business of Respondent*

Respondent is a California corporation engaged in the processing and sale of nuts at its place of business in Chico, California. During the past year, Respondent sold goods and merchandise valued in excess of $500,000, of which more than $50,000 in value represented sales to purchasers located outside the

[3] *Jas. A. Matthews Co., supra.*

state of California. During the same period, Respondent purchased goods and merchandise valued in excess of $50,000 directly from sellers located outside the state.

Respondent admits, and we find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

Warehousemen's Union Local 17, International Longshoremen's and Warehousemen's Union is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The representation proceeding*

1. *The unit*

The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Respondent at its processing plant at Chico, California, including warehousemen, but excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act.

2. *The certification*

On or about October 28, 1966, a majority of the employees of Respondent in said unit, in a secret election conducted under the supervision of the Regional

Director for Region 20, designated the Union as their collective-bargaining representative for the purpose of collective bargaining with Respondent. On December 1, 1966, the Board certified the Union as the exclusive collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. The request to bargain and the Respondent's refusal

Commencing on or about December 19, 1966, and continuing to date, the Union has requested and is requesting Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Since December 28, 1966, and continuing to date, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above in the Board's certification, and that the Union at all times since December 1, 1966, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that Respondent has, since December 28, 1966, refused to bargain collectively with the Union as the exclusive bargaining

representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

Conclusions of Law

1. Continental Nut Company is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Warehouseman's Union Local 17, International Longshoremen's and Warehousemen's Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Respondent at its processing plant at Chico, California, including warehousemen, but excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 1, 1966, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 28, 1966, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Continental Nut Company, Chico, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Warehousemen's Union Local 17, International Longshoremen's and Warehousemen's Union, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees of the Respondent at its processing plant at Chico, California, including warehousemen, but excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representa-

tive of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Chico, California, place of business, copies of the attached notice marked "Appendix".[4] Copies of said notice, to be furnished by the Regional Director for Region 20, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 20, in writing, within 10 days from the date of this Decision and Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., May 10, 1967

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

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[4]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order", the words "a Decree of the United States Court of Appeals, Enforcing an Order".

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT refuse to bargain collectively with WAREHOUSEMEN'S UNION LOCAL 17, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees at our processing plant at Chico, California, including warehousemen, but excluding office

clerical employees, salesmen, guards and supervisors as defined in the Act.

CONTINENTAL NUT COMPANY
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Avenue, San Francisco, California, 94102 (Tel. No. 556-3197), if they have any questions concerning this notice or compliance with its provisions.

Appendix C

STATUTES AND REGULATIONS INVOLVED.

The provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.) relied upon by the Petitioner in this case are as follows:

Section 9 . . .

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect

thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

Section 10 . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as pro-

vided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its

original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with re-

spect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The provisions of the National Labor Relations Board's Statements of Procedure—Series 8, as amended (29 C.F.R. Sections 101.11 et seq.) relied upon by Petitioner in this case are as follows:

SEC. 101.19 *Consent adjustments before formal hearing.*—The Board has devised and makes available to the parties two types of informal consent procedures through which representation issues can be resolved without recourse to formal procedures. These informal arrangements are commonly referred to as (a) consent-election agreement followed by regional director's determination, and (b) consent-election agreement followed by Board certification. Forms for use in these informal procedures are available in the regional offices.

(a)(1) The consent-election agreement followed by the regional director's determination of representatives is the most frequently used method of informal adjustment of representation cases. The terms of the agreement providing for this form of adjustment are set forth in printed forms, which are available upon request at the Board's regional offices. Under these terms the parties agree with respect to the appropriate unit, the payroll period to be used as the basis of eligibility to vote in an election, and the place, date, and hours of balloting. A Board agent arranges the details incident to the mechanics and conduct of the election. For example, he usually arranges preelection conferences in which the

parties check the list of voters and attempt to resolve any questions of elibibility. Also, prior to the date of election, the holding of such election shall be adequately publicized by the posting of official notices in the establishment whenever possible or in other places, or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as location of polls, time of voting, and eligibility rules.

(2) The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth. The Board agents and authorized observers have the privilege of challenging for reasonable cause employees who apply for ballots.

(3) Customarily the Board agents, in the presence and with the assistance of the authorized observers, count and tabulate the ballots immediately after the closing of the polls. A complete tally of the ballots is served on the parties upon the conclusion of the count.

(4) If challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and rules on the challenges. Similarly, if objections to the conduct of the election are filed within 5 days of the issuance of the tally of ballots, the regional director likewise conducts an investigation and rules on the objections. If, after investigation, the objections are found to have merit, the

regional director may void the election results and conduct a new election.

(5) This form of agreement provides that the rulings of the regional director on all questions relating to the election (for example, eligibility to vote and the validity of challenges and objections) are final and binding. Also, the agreement provides for the conduct of a runoff election, in accordance with the provisions of the Board's Rules and Regulations, if two or more labor organizations appear on the ballot and no one choice receives the majority of the valid votes cast.

(6) The regional director issues to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board.

(b) The consent-election agreement followed by a Board determination provides that disputed matters following the agreed-upon election, if determinative of the results, shall be the basis of a formal decision by the Board instead of an informal determination by the regional director. Thus, it is provided that the Board, rather than the regional director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. Thus, if challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and issues a report on the challenges instead of ruling thereon. Similarly, if objections to the conduct of the election are filed within 5 days after issuance of the tally of ballots, the re-

gional director likewise conducts an investigation and issues a report instead of ruling on the validity of the objections. In either event, the regional director's report is served on the parties, who may file exceptions thereto within 10 days with the Board in Washington, D.C. The Board then reviews the entire record made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the regional director's report and take appropriate action in termination of the proceedings. If a hearing is held on the challenged ballots or objections, all parties are heard and, if directed by the Board, a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served on the parties, who may file exceptions thereto within 10 days with the Board in Washington, D.C. The record made on the hearing is reviewed by the Board with the assistance of its legal assistants and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the regional director. If the union has been selected as the representative, the Board or the regional director, as the case may be, issues its certification, and the proceeding is terminated. If upon a decertification or employer petition the union loses the election, the Board or the regional director, as the case may be, certifies that the union is not the chosen representative.

The provisions of the National Labor Relations Board's Rules and Regulations—Series 8, as amended (29 C.F.R. Section 102.1 et seq.) relied upon by Petitioner in this case are as follows:

SEC. 102.62 *Consent-election agreements.*— (a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organiza-

tions representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determinattion is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70.

Appendix D

NATIONAL LABOR RELATIONS BOARD FORMS FOR CONSENT ELECTIONS.

NLRB-651
(12-61)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AGREEMENT FOR CONSENT ELECTION

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby waive a hearing and AGREE AS FOLLOWS:

1. SECRET BALLOT.—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

2. ELIGIBLE VOTERS.—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, employees in the military services of the United States who appear in person at the polls, employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements, but excluding any employees who have since quit or been discharged for cause and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than 12 months prior to the date of the election and who have been permanently replaced. At a date fixed by the Regional Director, the parties, as requested, will furnish to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. NOTICES OF ELECTION.—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The parties, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. OBSERVERS.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. TALLY OF BALLOTS.—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties. When appropriate, the Regional Director shall issue to the parties a certification of representatives or of results of election, as may be indicated.

6. OBJECTIONS, CHALLENGES, REPORTS THEREON.—Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within 5 days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

7. RUN-OFF PROCEDURE.—In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in accordance with the Board's Rules and Regulations.

8. COMMERCE.—The Employer is engaged in commerce within the meaning of Section 2 (6) (7) of the National Labor Relations Act.

9. WORDING ON THE BALLOT.—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot, or if the occasion demands, from top to bottom. (If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect.)

First.

Second.

Third.

10. PAYROLL PERIOD FOR ELIGIBILITY.—

11. DATE, HOURS, AND PLACE OF ELECTION.—

12. THE APPROPRIATE COLLECTIVE BARGAINING UNIT.—

If Notice of Representation Hearing has been issued in this case, the approval of this agreement by the Regional Director shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

(Employer)

By _____ _____
(Name and title) (Date)

(Name of Organization)

By _____ _____
(Name and title) (Date)

Recommended:

_____ _____
(Board Agent) (Date)

Date approved _____

_____
Regional Director,
National Labor Relations Board.

Case No. _____

(Name of other Organization)

By _____ _____
(Name and title) (Date)

GPO 937-448

Case No.
NLRB-652
(1-63)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STIPULATION FOR CERTIFICATION UPON CONSENT ELECTION

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act, as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby AGREE AS FOLLOWS:

1. SECRET BALLOT.—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board.

2. ELIGIBLE VOTERS.—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements, but *excluding* any employees who have since quit or been discharged for cause and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than twelve (12) months prior to the date of the election and who have been permanently replaced. At a date fixed by the Regional Director, the parties, as requested, will furnish to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. NOTICES OF ELECTION.—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The parties, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. OBSERVERS.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. TALLY OF BALLOTS.—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties.

6. POST-ELECTION AND RUN-OFF PROCEDURE.—All procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations.

7. RECORD.—The record in this case shall be governed by the appropriate provisions of the Board's Rules and Regulations and shall include this stipulation. Hearing and notice thereof, Direction of Election, and the making of Findings of Fact and Conclusions of Law by the Board prior to the election are hereby expressly waived.

8. COMMERCE.—The Employer is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). *(Insert commerce facts.)*

9. WORDING ON THE BALLOT.—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot, or if the occasion demands, from top to bottom. *(If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect.)*

First.

Second.

Third.

10. PAYROLL PERIOD FOR ELIGIBILITY.—

11. DATE, HOURS, AND PLACE OF ELECTION.—

12. THE APPROPRIATE COLLECTIVE BARGAINING UNIT.—

If Notice of Representation Hearing has been issued in this case, the approval of this stipulation by the Regional Director shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

.....
(Employer)

.....
(Address)

By .....
(Name and Title) (Date)

Recommended:

.....
(Board Agent) (Date)

Date approved.....

.....
Regional Director,
National Labor Relations Board.

Case No. .....

.....
(Name of Organization)

.....
(Address)

By .....
(Name and Title) (Date)

.....
(Name of other Organization)

.....
(Address)

By .....
(Name and Title) (Date)

GPO 901-841

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 603

CONTINENTAL NUT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. In September 1966, petitioner Company and the Union[1] executed an Agreement for Consent Election. The Agreement provided for the holding of a representation election under the supervision of the Board's Regional Director among a specified group of the Company's employees. It further provided that "the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election," and that the

[1] Warehousemen's Union Local 17, Int'l Longshoremen and Warehousemen's Union.

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"method of investigation of objections and challenges, including the question whether a hearing shall be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding". (Pet. App. ii–iii, xxxii.)

The Union won the election 90 to 73, with 2 ballots challenged. The Company filed an objection to the election, contending that the Union had affected employee free choice by promising numerous employees that initiation fees would be waived if the Union won the election. The Regional Director, after investigation, overruled the objection; he found that the Union's promises were not objectionable because the employees understood that any reduction in the initiation fee would apply to all employees who joined the Union, regardless of how any individual employee voted in the election.[2] The Regional Director accordingly certified the Union as the employees' bargaining representative. (Pet. App. iii–iv, xi–xiii.)

The Company, contending that the certification was invalid, refused to bargain with the Union, and an unfair labor practice complaint issued. The Board, noting that the Company had agreed to be bound by the Regional Director's findings and conclusions on objections to the election, held, in accordance with its customary practice respecting such agreements, that it would not consider the merits of the Regional Director's ruling on the objection, but only whether his action was arbitrary or capricious. Finding that the

[2] See *National Labor Relations Board* v. *Gafner Automotive & Machine, Inc.* No. 17486 (C.A. 6), August 16, 1968, 69 LRRM 2902.

Company had not established the latter, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (Pet. App. xiii, xv–xvi.) The Board ordered the Company to cease and desist from its unfair labor practices, and to bargain, on request, with the Union (Pet. App. xvii–xix).

The court of appeals agreed that the only issue open to review was whether the Regional Director's action was arbitrary or capricious, and that no such showing had been made. Accordingly, it enforced the Board's order. (Pet. App. i–viii.)

2. The sole question presented is whether the court below applied an erroneous standard in holding that, in the circumstances of this case, the only issue open to review was whether the Regional Director had acted arbitrarily or capriciously in overruling the Company's objection to the election. As petitioner recognizes (Pet. 8, n. 9), the parties to an election can waive or limit their right to judicial review. Moreover, as petitioner further recognizes (Pet. 10, n. 10), the courts have consistently interpreted the finality language of the type of consent agreement utilized here as manifesting the parties' intent to permit the Regional Director to make a final and conclusive determination of all issues in the representation proceeding, and to subject his determination to review by the Board and the courts only to the extent of insuring that he was not arbitrary or capricious.[3]

[3] This interpretation of the consent election agreement is not inconsistent with the statements in the Board's rules and regulations respecting the difference between that type of agreement and a Stipulation for Certification upon Consent Election (Pet.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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6–8). The rules and regulations merely point out that, in the case of the latter, the Board, rather than the Regional Director, determines questions concerning eligibility, challenged votes, and objections to the conduct of the election; they do not concern themselves with the other differences between the two types of agreements, since it is provided that copies may be obtained from the Board's Regional Offices (Pet. App. xxvi). A comparison of the agreements themselves reveals that the consent agreement provides that the "method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding" (Consent Agreement, par. 6; Pet. App. xxxii). On the other hand, the stipulation provides that "All procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations" (Stip., par. 6; Pet. App. xxxii)—the procedure followed even in non-consent cases. This difference between the two agreements justifies a difference in the scope of administrative and judicial review available under each agreement.

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